Supreme Court, U.S.
FILED
APR 16 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1285

IN THE

Supreme Court of the United States

October Term, 1985

JO ELLEN D. BAILEY,

Petitioner,

vs.

COMMONWEALTH OF PENNSYLVANIA,

Respondent.

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

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Counterstatement of Questions Presented for Review

A. Was the Defendant's Sixth Amendment right to counsel violated to the extent that a dismissal of the charges was warranted when Officer Garber spoke to her at the York County Prison in the absence of counsel?

Answered in the negative by the Court of Common Pleas, Superior Court of Pennsylvania and Supreme Court of Pennsylvania.

B. Was the Commonwealth entitled to withdraw from a proposed plea bargain?

Answered in the affirmative by the Court of Common Pleas, Superior Court of Pennsylvania and Supreme Court of Pennsylvania.

C. Did the pretrial publicity emanating from statements of the District Attorney deny the Defendant due process of law?

Answered in the negative by the Court of Common Pleas, Superior Court of Pennsylvania and Supreme Court of Pennsylvania.

D. Did the District Attorney deny the Defendant due process of law by trying the case after having earlier announced that he was appointing an Assistant District Attorney to try the case?

Answered in the negative by the Court of Common Pleas, Superior Court of Pennsylvania and Supreme Court of Pennsylvania.

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Counterstatement of the Case

The criminal charges against the Defendant arose out of the beating death of Aleta Bailey, a five year old child. The Defendant, Jo Ellen Bailey, the mother of the child, and her boyfriend, Larry Hake, were charged with criminal homicide. Both Defendants lived with the victim in the Defendant Bailey's mobile home which was located in a mobile home park. The victim's father was in the military service and stationed in a Southern state. In January, 1982, the police and Children's Services caused the child to be taken to the hospital as a result of a

complaint of child abuse instituted by a third party. Examination of the child revealed bruises indicating that the child had been assaulted. This incident was handled informally, and Hake and the Defendant agreed that Hake would leave the residence and that the Defendant would not abuse the child. Thereafter, the Defendant and the child resided alone in the mobile home. Approximately a month after the initial incident of assault, on February 17, 1982, Hake returned to the mobile home for several hours and ate dinner. The Defendant testified that the child misbehaved during dinner, and that she and Hake required the child to stand in a corner. Hake left the household at approximately nine o'clock p.m., and the Defendant testified that during his stay, no abuse occurred. After Hake left the residence, the Defendant bathed the child and testified that she saw no bruising whatsoever. Hake returned on February 18, the next day, at about one o'clock p.m., and took a nap. Defendant testified that the child was not feeling well, and remained in her room throughout the day. The Defendant, Hake, and the child remained in the home until about 4:30 on the afternoon of February 18. During this time, the Defendant testified that Hake slept, the child stayed in bed in her room because she had a cold, and the Defendant cleaned the kitchen. The Defendant testified that no abuse occurred during this time. At approximately 4:30 p.m. on February 18, the Defendant testified that Hake carried the child into the living room, stating that he found the child unconscious, and Hake immediately left the mobile home and summoned an ambulance. The Defendant testified that neither she nor Hake had done anything to the child to cause injury either on February 17, 18, or at any other time, although the Defendant did postulate that Hake may have suddenly beaten the child

immediately prior to carrying the child out into the living room and summoning the medical personnel. However, the mother testified that she heard nothing and that the mobile home where the parties lived was quite small. Paramedical personnel arrived at the mobile home within moments after 4:30 p.m. on February 18 and the child was immediately transported to the hospital. A medical examination of the child revealed an odor of alcohol about her and also showed innumerable injuries, including severe bite marks over various portions of her body, bruises over her entire body (arms, legs, hands, feet, head, face, vagina, and rectal area), a tear in the child's rectum and contusions inside the vagina, and an autopsy showed that the brain was grossly swollen as a result of many blows to the head. The bruises and bite marks over the entire body, including the face and head, had started to blacken and were not of extreme recent origin. The pathologist testified that the fatal blows to the head occurred from ten to twelve hours before the child's death from brain swelling. The autopsy also revealed the presence of alcohol in the child's blood. On the night before the child's death, after Defendant's boyfriend had, by Defendant's testimony, left the mobile home, a neighbor heard loud noises coming from the mobile home, as if someone were knocking furniture around. This same neighbor testified that several days prior to the death of the child, the Defendant stated that she wanted to "get rid" of her child and that the Defendant, on this occasion, hit the child on the head, knocking her down. The physicians who testified at trial stated that the child's death could have only resulted from an intentional beating occurring over an extended period of time prior to the death of the child. The jury convicted the Defendant of murder in the third degree.

Several months prior to trial, Detective Garber, the prosecuting officer, casually saw the Defendant at the York County Prison while he was there on other business. The Defendant remarked to the detective that she would like to speak with him some time. Several days later, the police officer did go down to the York County Prison and talked with her, although the specifics of her case were not discussed and the conversation led to the discovery of no new evidence. This conversation was not admitted into evidence against the Defendant, and the detective and defense counsel acknowledged at a subsequent hearing before Judge John Miller that the District Attorney had instructed the detective not to interrogate the Defendant.

Prior to trial, the Defendant, through her counsel, represented that she would testify against her boyfriend in exchange for a plea to manslaughter. The District Attorney tentatively accepted this arrangement pending an interview with the Defendant in the presence of her counsel. However, at this interview, the version given by the Defendant did not inculpate the boyfriend and was totally contradictory to the physical evidence available to the District Attorney, particularly the medical testimony as to the nature of the injuries and the cause of death. Furthermore, the Defendant denied any involvement so as to permit her to even enter a plea to involuntary manslaughter. Consequently, the plea agreement was rejected. In any event, the version related by the Defendant during this interview with the District Attorney was not used against her, even when she presented a completely different version at her trial. After the interview, the District Attorney also learned from the attorney for the Defendant's boyfriend that the Defendant had written her boyfriend, against whom she

promised to testify, and had told him that she would even "burn" him if she were called to testify and that, further, she was hopeful that he would soon be released from prison so that they could continue their co-habitation without interference from the child, Aleta Bailey. After a hearing, Judge James E. Buckingham ruled that the withdrawal of the plea bargain was not only in good faith but was the only available alternative.

After conviction by a jury before Judge Emanuel A. Cassimatis of the Court of Common Pleas of York County, Pennsylvania, in Wayne County, Pennsylvania, the site selected after a change of venue, appeals to the Pennsylvania Superior Court and Pennsylvania Supreme Court were denied and this Petition for Certiorari is now before your Honorable Court.

Summary of Argument

Several months prior to trial, Detective Garber, the investigating officer, spoke with the Defendant at the York County Prison pursuant to her request, despite a previous warning by the District Attorney not to talk to Ms. Bailey (Reproduced Record, Volume 2, Page 16). Although this was done in the absence of counsel, no evidence concerning the crime was gathered at this interview nor was any of the conversation used at trial or to her detriment. Absent such a showing she is not entitled to any type of relief.

A prosecutor is justified in withdrawing from a plea bargain when the Defendant fails to fulfill the agreement or there are other extenuating circumstances. In the instant case, the Commonwealth agreed to accept a plea to involuntary manslaughter on the condition that the Defendant testify against her boyfriend, Larry Hake, the Co-Defendant. The plea agreement was rejected because the Defendant did not admit any culpability which would support a plea to involuntary manslaughter, her statements were in direct conflict with known physical evidence and it was learned after the interview that the Defendant had written to her boyfriend and had indicated that she would not "burn" him by her testimony. The Commonwealth was therefore justified in withdrawing the plea bargain.

Prejudicial pretrial publicity was never established. Assuming *arguendo* that it was, there was no causal relationship between any such publicity and the Defendant's supposed loss of witnesses.

The District Attorney was entitled to try the case. Despite an earlier statement to the contrary, Mr. Ness had handled all prior proceedings, had never withdrawn his appearance and it had been his policy to personally assume trial responsibility for all homicides. In addition, the Defendant's petition to the Pennsylvania Supreme Court to appoint an out-of-county prosecutor was dismissed. In the absence of any proven impermissible prejudice, there was no error.

ARGUMENT

A. The Defendant's Sixth Amendment to counsel was not violated.

The Sixth Amendment provides that an accused shall enjoy the right "to have the Assistance of Counsel for his defense." This right, fundamental to our system of justice, is meant to assure fairness in adversary criminal process. *Gideon v. Wainwright*, 372 U.S. 335, 344, 9 L Ed 2d 799. As the United States Supreme Court stated in *Maine v. Moulton*, 54 U.S.L.W. 4039 (1985):

> The Sixth Amendment guarantees the accused at least after the initiation of formal charges, the right to rely on counsel as a "medium" between him and the State . . . (T)his guarantee includes the state's affirmative obligation not to act in a manner that circumvents the protection accorded the accused by invoking this right . . . (K)nowing exploitation by the State of an opportunity to confront the accused without counsel being present is as much a breach of the State's obligation . . . as is the intentional creation of such an opportunity. Accordingly, the Sixth Amendment is violated when the state obtains incriminating statements by knowingly circumventing the accused's right to have counsel present in a confrontation between the accused and the state agent.
>
> 54 U.S.L.W. at 4042.

The cases have accordingly been responsive to proved claims that governmental conduct has rendered counsel's assistance to the defendant ineffective. *Moore v. Illinois*, 434 U.S. 220, 54 L.Ed.2d 424 (1977); *Massiah v. United States*, 377 U.S. 201, 12 L.Ed.2d 246 (1964).

However, cases involving Sixth Amendment deprivations are subject to the general rule that remedies should be tailored to the injury suffered from the

constitutional violation. *United States v. Morrison*, 449 U.S. 361, 66 L.Ed.2d 564 (1981). The case law has reflected this approach in that the appropriate remedy for a particular violation of the right to counsel may be either: suppression of evidence obtained from an accused in the absence of his counsel, *id.*; reversal and remand for a new trial upon a showing that such evidence admitted at trial was "harmful", *id.*; denial of a new trial and affirmance of a conviction where no "harm" was demonstrated, *id.*; and automatic reversal and remand for a new trial in some instances without the need to show harm (citations omitted) *Commonwealth v. Shirey*, Pa. S. 481 A.2d 1314 (1984). More particularly, absent demonstrable prejudice, or substantial threat thereof, dismissal of the indictment is plainly inappropriate, even though the violation may have been deliberate.

The Court must recognize that the action of the state must be a knowing exploitation of an opportunity to confront the accused without counsel being present. The state cannot be permitted to circumvent the protection afforded by this right. No such edition occurred in this case. Assuming, however, that the Sixth Amendment was violated in the circumstances of this case, the error was harmless and no prejudice resulted.

B. The Commonwealth was entitled to withdraw from the proposed plea bargain.

The landmark decision in the area of rights in regard to a plea bargain is *Santobello v. New York*, 404 U.S. 257, 30 L.Ed.2d 427 (1977), in which the prosecutor violated an agreement with the Defendant by recommending the maximum prison term at a sentencing hearing subsequent to the Defendant's entry of a guilty plea to a charge of possession of gambling records in

accordance with the plea of bargain. The Court vacated the judgment, stating that when a guilty plea rests in any significant degree on a promise or agreement of the prosecution, so that the promise or agreement can be said to be part of the inducement or consideration, then the promise or agreement must be fulfilled.

The American Bar Association Standards for Criminal Justice (1980), Standard 3-4.2(c), which was substantially revised apparently in response to the *Santobello* Case, provides that it is unprofessional conduct for a prosecutor to fail to comply with a plea agreement unless a Defendant fails to fulfill the agreement or unless other extenuating circumstances are present. Notwithstanding the clear implication of this ABA Standard in a majority of the cases in which the issue has arisen, courts have held that a prosecutor does have a right to withdraw from a plea bargain prior to the entry of a guilty plea by the Defendant in compliance with the agreement.

The petitioner states that the instant case conflicts with *State v. Brockman*, 277 Md. 687, 357 A.2d 376 (1976) and *Grey v. McClure*, S.E.2d 704 (1978), thereby rendering it ripe for action by your Honorable Court. In *Brockman*, Defendant gave a statement in which he totally incriminated himself and provided the prosecution with every fact and detail of the murder. However, since he did not recognize a photograph of his alleged principal, the State refused to comply with the bargain and Brockman was convicted of first degree murder. The Court of Special Appeals vacated the judgment and remanded to the trial court. The Court of Appeals held that Brockman was entitled to have the terms of the plea bargain enforced.

It is respectfully submitted that the instant case does *not* recite the facts of *State v. Brockman*, as the petitioner would have us believe (Petition for Writ of Certiorari, page 23). In this case, the Defendant did not admit her guilt and her recitation of the facts was in direct conflict with known physical evidence. In addition, it was later learned that she was corresponding with her co-defendant and assuring him that her testimony could not "hang" him. Interestingly enough, the Court in *Brockman* noted: "Of course, there may be situations in which the State may refuse to abide by a bargain it has entered, where, for example, a Defendant fails to cooperate sufficiently or materially misrepresents the facts in his testimony." Such is the case here. Indeed, this case is more akin to that of *Ellison v. State*, 56 Md. App. 567, 468 A.2d 413 (1983), in which the Court of Special Appeals held that the State was justified in revoking a plea bargain which was conditioned upon Defendant not being the robbery participant who shot victim, where further investigation revealed facts sufficient to charge him as actual killer.

In the *McClure* case, the Supreme Court of Appeals of West Virginia held that a prosecuting attorney or his successor is bound to the terms of a plea agreement once the Defendant enters a plea of guilty or otherwise acts to his substantial detriment in reliance thereon. Absent such a showing by the Defendant, the case was remanded to the Circuit Court. Thus the *McClure* case is of no assistance. The truth is that the viability of plea bargains depend on a wide variety of purely factual situations and the conflicts in the case do not warrant consideration by your Honorable Court. See 16 ALR 4th 1089 and *Mabry v. Johnson*, _____ U.S. _____, 81 L.Ed.2d 437 (1984).

C. The pretrial publicity did not deprive Defendant of due process.

The defense argues that as a result of pretrial publicity emanating from the District Attorney that she was deprived of three character witnesses. First, such publicity was not established; secondly, the causal relationship between any such publicity and loss of witnesses was not demonstrated; and thirdly, the Defendant did call a number of character witnesses to testify on her behalf at trial (N.T. 235-236, 333-334, 336). After the numerous pretrial hearings and disclosure at such hearings of evidence to be presented, certain witnesses that the Defendant said she wanted to call expressed a preference not to testify. The Defendant never subpoenaed such witnesses and they were never contacted or dissuaded by the Commonwealth from testifying. The witnesses were not spirited away by the Commonwealth nor was there any active interference by the Commonwealth in any fashion. In any event, the Defendant did call character witnesses at her trial.

D. The Defendant was not denied due process of law by the District Attorney personally trying the case.

The Defendant's argument in support of this argument is basically a restatement of the argument contained in support of prior issues. Petitioner admits that she has discovered no state, federal or Supreme Court cases on point but does cite *U.S. v. Bagley*, 641 F.2d 1235 (9th Circ. 1981), apparently for the proposition that prosecutors who have acquired information illegally should "insulate" themselves from such information. The *Bagley* case involved an alleged *Massiah* violation. In that case, although information was received from the Defendant by an informant, that information was not

used at trial and the prosecutors were careful to insulate themselves from that information by not receiving any notes, tapes or statements. In the instant case, Mr. Ness properly insulated himself from any information by not using it. Nor did the Commonwealth use it at trial. Assuming that the law in Pennsylvania is that statements made in pursuance of a plea bargain are inadmissible. See *Comm. v. Callaway*, 313 Pa. Super. 173 (1983), the Defendant can establish no prejudice here.

Respectfully submitted,

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